UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

POLECARE, A DIVISION OF
CHEMICAL SPECIALTIES, INC.

Employer[1]

and Case No. 29-RC-9723

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL UNION 1049, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Sharon Chau, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officers' rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that Polecare, a division of Chemical Specialties, Inc., herein called the Employer or Polecare, is a North Carolina corporation, with its principal office located at P.O. Box 1330, 5910 Pharr Mill Road, Harrisburg, North Carolina, and a place of business located at 277 Old Country Road, Lot 23, Riverhead,

New York, herein called its Riverhead facility, where it has been engaged in the business of utility pole inspection and restoration. During the past year, which period is representative of its annual operations generally, the Employer purchased and received at its Riverhead facility, goods and supplies valued in excess of $50,000 directly from points located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The International Brotherhood of Electrical Workers, Local Union 1049, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time laborers and foremen employed by the Employer in Nassau and Suffolk counties, New York, but excluding all guards and supervisors as defined in the Act.

At the hearing, the Employer contended that its foremen and foreman-trainees are Section 2(11) supervisors. In addition, Polecare asserted that its employees and supervisors are ineligible to select a bargaining representative because they have definite termination dates and are thus "temporary in nature." The Employer's post-

[1] The names of the Employer and Petitioner appear as amended at the hearing. (See Board Exhibit 2.)

hearing brief did not allude to the alleged supervisory status of the foreman-trainees. Otherwise, its position remained unchanged.

The Petitioner's position at the hearing was that the unit employees are permanent, that the foreman-trainees are not supervisors, and that only some of the foremen are supervisors. Subsequently, the Petitioner's brief conceded that Bill Sanders, Carmen Martino, Jeremy Finch and James Adams are supervisors, while contesting the supervisory status of Robert Hitchings and taking no position on Eugene Harms or Boyce Terrell.[2]

The Employer's witnesses were Eugene Young, its Northeast Regional Manager, and William Sanders, a foreman slated for promotion to Resident Supervisor. The Union's witness was James Diodato, who worked for the Employer for 3 ½ years until his discharge on August 21, 2001. For most of his career at Polecare, Diodato was the Resident Supervisor in Nassau and Suffolk, which meant that the Employer's foremen reported directly to him. Three months before his termination, Diodato was demoted to foreman.

Alleged Temporary Status of Unit Employees

Young testified that the Employer, which operates in ten states, is in the business of inspecting and restoring utility poles. Currently, Polecare has three active contracts: (1) one with New York State Gas and Electric, for work in upstate New York; (2) a second with Keyspan Energy ("Keyspan"), to perform inspection work in Nassau and Suffolk counties from March 2001 until March 25, 2002; and (3) a third based on a subcontract with Asplundh Tree Expert Co. ("Asplundh"), which, in turn, has a contract

[2] Brief of Petitioner at 7.

with Keyspan, to perform restoration work on Keyspan's utility poles in Nassau and Suffolk counties. The Asplundh contract runs from June 2000 until June 2002.[3] The Asplundh and Keyspan contracts both have "early termination" options, but Young has received no indication that they will be exercised.

Despite the Employer's allegation that "each employee in the petitioned for unit is temporary in nature,"[4] the record evidence does not support this conclusion. Thus, when asked by the Hearing Officer whether he "knows for sure" that the Keyspan and Asplundh contracts will not be extended beyond their current expiration dates of March and June, 2002, respectively, Young conceded that he does not. Although Young claimed that the Employer is not currently bidding on any pole restoration work in Nassau or Suffolk counties, he was not asked about current bids to perform work in other counties, current bids on pole inspection work, or the possibility of future bids on pole restoration or inspection work in Nassau, Suffolk, or other counties or states.

With regard to possible employment opportunities after the expiration of the current contracts, Young testified as follows:

> Q: "And when [the contract] ceases and desists, what happens to the employees who are doing the work under that contract?"
>
> A: "…if there is another contract in the area, or another contract available, which would be different than this one, they would have the opportunity to either join the other contract, relocate to another state, or terminate their employment.
>
> Q: Which states could they relocate to?
>
> A: Well, depending upon where the work was at that particular time. Right now, Texas, Arizona. I mean there's a couple options, but just depends at that particular time, you know, what—what contracts were entered into and where we need help.

[3] The record reflects that a previous contract between the Employer and Asplundh expired in June 2000, but was extended for two years.
[4] Brief of Employer at 12.

Based on Young's conjectures, I am unable to conclude definitively, as asserted by the Employer, that all unit employees will be terminated in the spring of 2002. Moreover, Sanders claimed to have told his crew that "…If this contract ends, everybody's going to leave [Long] Island;[5] then they go full-ground line. Because [Long] Island seems to be the only place, at this point in time, that is doing a sound and bore. Everyone else is on full-ground line." In short, Sanders appears to have concluded that if the current contracts expire, his crew will then proceed to perform "full-ground line" work in a different county, rather than becoming unemployed.

The cases cited by the Employer in support of its "temporary employee" argument[6] are factually distinguishable from the instant case. For example, in *Apex Paper Box Co.,* 302 NLRB 67 (1991), the Board sustained challenges to the ballots of employees who were on layoff status on the eligibility date, and thus the case is of minimal relevance. Also inapposite is *Pen Mar Packaging Corporation*, 261 NLRB 874 (1982), where the Board invalidated a ballot cast by an individual who "was informed that he was being hired only for the summer with no expectancy of permanent employment [and who]…. considered himself a temporary employee." Similarly, *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992), involved an employee who was hired as a temporary file clerk, who was specifically identified as a temporary employee in her performance appraisal, and whose termination date was postponed only "until the filing backlog was completed."

In the instant case, by contrast, there is no evidence that employees were specifically told that they were being hired on a temporary basis, or that their

[5] Long Island, a.k.a. "The Island," is comprised of Nassau and Suffolk counties.
[6] Brief of Employer at 12-13.

employment would end upon completion of the current Keyspan and Asplundh contracts in March and June, 2002. The record evidence leaves open the possibility that the Employer may enter into new contracts between now and June, 2002, or that the Employer's existing contracts may be extended beyond June, 2002, enabling the petitioned-for employees to remain employed. Under the "date certain" test, discussed in the Employer's brief,[7] "an employee may be fully aware that his or her employment will be short-lived, but as long as no definite termination date is known and the employee was employed on the eligibility and election dates, he or she will be eligible to vote." *New England Lithographic Co*., 100 LRRM 2001, 2004, 589 F.2d 29 (1st Cir. 1978); *see also Ameritech Communications*, 297 NLRB 654, 655 (1990)(employment in the relevant geographical area until completion of projects, on an unknown date); *Emco Steel Inc*., 227 NLRB 989, 991 (1977)(employment until the conclusion of a strike at employee's regular employer, on an unknown date). Here, although the termination dates of the current contracts are known, the termination dates of the petitioned-for employees are indefinite. Based upon the aforegoing, I am unable to find that the petitioned-for unit is "temporary in nature" as alleged by the Employer.

Alleged Supervisory Status of Foremen

In light of the exclusion of supervisors from the protection of the Act, the burden of proving that an individual is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc*., 121 S.Ct. 1861, 1866, 167 LRRM 2164 (2001); *Boston Medical Center Corporation*, 330 NLRB No. 30 at 83 (1999). In defining "supervisor" in Section 2(11), "Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up

[7] *Id.*

men' who are protected by the Act even though they perform 'minor supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in Providence Hospital,* 320 NLRB 717, 725 (1996). Accordingly, the statutory definition provides that:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Under this definition, a party seeking to exclude an alleged supervisor from the Act's protection must meet "a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in [or effectively recommend] any one of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *Kentucky River Community Care, Inc*., 121 S.Ct. at 1867.

In the instant case, Young testified that the number of foremen fluctuates with the workload, and has ranged from about three to as many as twenty-five. Currently, there are about seven foremen working in Nassau and Suffolk counties, according to Young. Both the foreman-trainees and the laborers (referred to as "crew members") report to the foremen. The work performed by these two groups of employees overlaps, with the foreman-trainees performing laborers' work while learning foremen's duties as well. The number of crew members or foreman-trainees reporting to a particular foreman depends on the type and volume of the work performed. For example, Young indicated that there are two types of pole restoration work: fiber wrap restoration and steel restoration. Fiber wrap restoration requires a foreman and at least three crew members, whereas steel

restoration is typically conducted by a foreman and one crew member. Similarly, pole inspection methods range from “low end” inspections, which can be performed by one person, to “high end” inspections, requiring additional crew members. When the volume of work is light, two foremen may temporarily team up together to form a crew, or one foreman might work alone. In such instances, according to Young, the affected foremen retain their supervisory authority, superior wage rate and benefits. Diodato confirmed that when he was the Resident Supervisor, he assigned two foremen to work together during occasional slow periods.

The record contains ample evidence of foremen’s supervisory authority. For example, there was a consensus among the three witnesses that foremen alone are empowered to interview job applicants and hire their own crews, with minimal involvement by management. It is undisputed that members of management generally follow the foremen’s promotion recommendation, since the foremen alone have the opportunity to observe their crew members on a day-to-day basis. The Employer’s witnesses testified, without contradiction, that foremen have the authority to investigate disciplinary incidents and make disciplinary decisions, without first consulting with higher management. In addition, Young maintained that foremen have the authority to discharge employees, using as a "guideline” the progressive disciplinary policies and procedures in the Employer’s “Foreman Administrative and Safety Manual.” Although the manual provides that all terminations must be approved by the Regional Manager, a foreman may terminate an employee on his own if Young is unavailable, or if the employee is subject to immediate termination for safety violations or substance abuse. Although Young indicated that he “prefers a consultation” in cases involving judgment

calls or personality conflicts, the record reflects that foremen have a major role in discharge decisions. Union witness Diodato confirmed that when he was the Resident Supervisor, foremen were empowered to discharge employees without his knowledge.

Finally, the evidence shows that the foremen "responsibly direct" and assign work to employees. According to Young, the foremen are "responsible for seeing that [crew members] get the appropriate amount of work done, that they show up on time, that they're safe, that they're doing the duties that they're instructed to do…by the foreman." Sanders testified that he shows foreman-trainees how to perform the work. In addition, he oversees their work and corrects their mistakes. Union witness Diodato acknowledged that a foreman can "run his crew any way he wants to do it. The [Resident] Supervisor really has no say" in the assignment of work to crew members or trainees. In some instances, according to Young, a foreman may "lend" a crew member to another foreman who is short-staffed. In general, the employer's witnesses testified that the foremen try to make assignment decisions in accordance with employees' individual "strong points." Notably, the assignment of tasks "based on assessment of a worker's skills [is deemed by the Board and federal courts] to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Brusco Tug and Barge Co.,* 247 F.3d 273, 278 (D.C. Cir. 2001)(citing *Hilliard Development Corp*., 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)).

Accordingly, based on the record as a whole, I find that "Polecare employees performing the duties of a foreman" are statutory supervisors, as the Petitioner concedes in its brief.[8] The only issue with respect to the foremen is whether Eugene Harms,

[8] Brief of Petitioner at 7.

Boyce Terrell and Robert Hitchings perform these duties.

Eugene Harms

Although Harms did not appear at the hearing, Young testified as follows:

Q: Okay. Do you have any other foremen?

A: There aren't any.

Q: What about…Gene Harms?

A: Okay. Gene—Gene is a foreman at this—at this time.

Q: Tell me about Gene. When did he become a foreman?

A: He was trained as a foreman about three or four months ago, and then at one point, didn't really care for the inspection part of the job, so he went to work for Carmen Martino on the restoration crew, and then as of last week, or the week before, we needed—we needed an additional inspection crew to fulfill our obligation, and he went back to inspecting at our request, just like I said, about a week ago—week—two weeks ago.

Q: So am I correct in presuming he does the same work as Adams?

A: Yes.

Q: Okay.

A: Yes; and he presently has a—a trainee on his crew. That would be Judy Hitchcock—Hendrickson —Hendrickson.

At a later point in the proceeding, however, William Sanders testified that he (Sanders) is currently supervising one foreman-trainee: "Now I have Judy Hendrickson, which I let—I'm not available such as today. She's training and working with Gene Harms today." When this testimony is read in combination with that of Young, the evidence appears to establish that on September 7, 2001, the day that Sanders testified at the hearing, Harms filled in for Sanders as a substitute supervisor. There is no evidence

that Harms possessed any supervisory authority while working on Martino's crew, or during the week or two prior to the hearing, while performing inspection work. As noted in Petitioner's brief, in connection with its discussion of Robert Hitchings, the Board "has held that isolated substitution does not warrant a supervisory finding."[9] The record, likewise, does not establish that Harms exercises any of the enumerated supervisory indicia on an ongoing and regular basis. Accordingly, the Employer has not met its burden of proof with regard to Harms' supervisory status, and I find that Eugene Harms is a statutory employee.

Boyce Terrell

Young testified that the Employer hired Boyce Terrell as a foreman-trainee "a couple of months" ago. He was trained to perform fiber wrap restoration work, but was not "cross-trained" to perform steel restoration or inspection work. Two weeks prior to the hearing, he became a fiber wrap restoration foreman, with a team of four crew members.

According to Young, Terrell is performing the same work as Jeremy Finch ("Finch"), who was also promoted to foreman within the last two weeks. The Union does not dispute the supervisory status of Finch, and the Union's brief acknowledges that Terrell was "promoted to replace Mr. Diodato."[10] The Petitioner did not call Terrell as a witness, or submit any evidence to rebut Young's testimony regarding Terrell's supervisory status. Based on the aforegoing, I find that Boyce Terrell is a supervisor as defined in Section 2(11) of the Act.

[9] Brief of Petitioner at 8 (citing *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985)).
[10] Brief of Petitioner at 8.

Robert Hitchings

Young stated that Robert Hitchings was hired as a steel restoration foreman-trainee three or four months ago. He was also "cross-trained" to perform fiber wrap restoration and inspection work. Within the last month, he was promoted to steel-restoration foreman, and had his own one-person crew for "a couple of weeks." Currently, however, Hitchings and another foreman, Carmen Martino, are performing steel restoration work together as a team, without crew members.

In its brief, the Petitioner contended that when Hitchings had his own crew, he was merely acting as a temporary foreman substitute, not a foreman.[11] Citing *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985), the Petitioner then argued that "isolated substitution does not warrant a supervisory finding."[12] If Hitchings were truly a supervisor, the Union reasoned, then he, and not Terrell, would have replaced Diodato as a fiber wrap foreman when Diodato was discharged. However, the record reflects that Hitchings and Terrell had about the same amount of experience. Terrell's training (and not Hitchings') had been limited to fiber wrap restoration, the same work Diodato had been doing. According to Young, one reason Terrell was chosen to assume Diodato's responsibilities was that Hitchings still had his own crew and was performing steel restoration work at the time of Terrell's promotion. In addition, the Employer was anticipating an imminent increase in the steel restoration work load. Therefore, it sought to keep Hitchings and Martino available to serve as steel restoration foremen as the need arose. As noted above, Terrell was not trained in steel restoration.

[11] Brief of Petitioner at 7-8.
[12] *Id*. at 8.

Petitioner did not call Hitchings as a witness. It did not submit any direct evidence in support of its allegation that Hitchings is only a sporadic, substitute supervisor. Moreover, there was uncontroverted testimony that when work is slow, two foremen may combine to form a temporary, two-person crew, without sacrificing their supervisory authority, wage rate or benefits. Therefore, based on the record evidence, I find that Robert Hitchings possesses the authority of the other foremen employed by the Employer and whom I have found to be supervisors and therefore he, too, is a supervisor as defined in Section 2(11) of the Act.

Alleged Supervisory Status of Foremen-Trainees

The Petitioner argues in its brief that the foreman-trainees and management trainees are generally not held to be statutory supervisors by the Board.[13] Since the Employer has not provided any evidence that the foreman-trainees exercise supervisory authority, or any case law in support of its theory that its foreman-trainees are supervisors, it has not met its burden of proof on this issue. Accordingly, I find that the Employer's foreman-trainees are part of the bargaining unit.

Moreover, as noted in Petitioner's brief,[14] the foreman-trainees share a community of interest with the crew members/laborers. These two categories of employees perform similar work, have similar skills and qualifications, share the same supervision, have similar rates of pay, and receive no benefits. In light thereof, it appears and I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

[13] Brief of Petitioner at 10-11 (citing *FWD Corp*., 138 NLRB 386 (1962); *Neisner Bros., Inc*., 200 NLRB 935 (1972)).
[14] Brief of Petitioner at 13-14.

All full-time and regular part-time laborers, crew members and foreman-trainees employed by the Employer in Nassau and Suffolk, New York, excluding all guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Brotherhood of Electrical Workers, Local Union 1049, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with

them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before October 11, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by October 18, 2001.

Dated at Brooklyn, New York, October 4, 2001.

/s/ Alvin Blyer
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